In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1202

55 GAMBLING DEVICES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that gambling devices are not subject to forfeiture under 15 U.S.C. 1177,[1] because of the owner's failure to register under 15 U.S.C. 1173

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[1] 15 U.S.C. 1177 provides in relevant part:

> Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States.

(a)(3),[2] unless the owner had knowledge of the registration requirement, and (2) that the registration requirement violated the owner's Fifth Amendment privilege against self-incrimination.

After a civil forfeiture proceeding in the United States District Court for the Western District of Louisiana, the court found fifty-five gambling devices (pinball machines) subject to forfeiture because their owner had failed to register with the Attorney General as required by 15 U.S.C. 1173(a)(3). The court of appeals affirmed *per curiam* (Pet. App. 23-27).

On November 24, 1970, FBI agents seized fifty-five pinball machines from Nick Putch,[3] who at the time was engaged in the business of repairing, reconditioning, buying and leasing pinball machines.[4] Although Putch knew these machines had been manufactured in Chicago, Illinois, and had been transported in interstate commerce to Louisiana, he failed to register with the Attorney General as prescribed by 15 U.S.C. 1173 (a)(3).

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[2]15 U.S.C. 1173(a)(3) provides:

> It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by others any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30 of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection.

[3]On February 23, 1973, and March 13, 1973, the parties stipulated to the pertinent facts. The only disputed fact at the forfeiture proceeding on April 5, 1973, was Putch's knowledge of the registration statute.

[4]Some of the machines seized had been purchased by Putch after the passage of the Gambling Devices Act of 1962. Prior to this Act, only manufacturers and dealers were obligated to register with the Attorney General. After its passage, the purchase of a gambling device triggered the registration requirement. Since the Act compels the person and not the machines to be registered, all machines possessed by an unregistered person, regardless of their date of acquisition, are subject to forfeiture. *United States* v. *Various Gambling Devices*, 478 F. 2d 1194, 1199 (C.A. 5).

Putch, who had been involved in the pinball business for approximately twenty years, claimed that he had failed to register because he was not aware of the registration requirement (Tr. 2, 4, 7).[5] In order to show petitioner's knowledge, the government introduced into evidence several advertising circulars sent out by New Orleans Novelty and S & H Novelty, the companies from which Putch had purchased his machines. Some of these circulars contained explicit warnings concerning the federal registration requirement. Although Putch admitted receiving many such circulars and reading most of them, he denied ever receiving or reading correspondence that mentioned the registration requirement (Tr. 9-21).

1. The contention that knowledge of the obligation to register under 15 U.S.C. 1173(a)(3) is a prerequisite to a valid forfeiture under 15 U.S.C. 1177 is without merit. Although petitioner Putch acknowledges that 15 U.S.C. 1173(a)(3), as written, does not require such knowledge (Pet. 11), he asserts that proof of knowledge is necessary because of this Court's decision in *Lambert* v. *California*, 355 U.S. 225. But *Lambert* specifically distinguished the criminal registration statute at issue there from those registration laws, akin to licensing statutes, which, like the statute here, pertain to the regulation of business activity. *Id.* at 229.[6]

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[5]"Tr." refers to the transcript of the forfeiture proceedings on April 5, 1973.

[6]In any event, the district court allowed petitioner to testify at length concerning his alleged lack of familiarity with the registration requirement contained in 15 U.S.C. 1173(a)(3). The court of appeals found sufficient evidence to sustain the forfeiture, however, "even if knowledge on the part of [petitioner Putch] was necessary to validate the forfeiture." Pet. App. 26. As noted earlier, petitioner admitted that he had been engaged in the pinball business for approximately twenty years and that he had received and read many circulars advertising gambling devices. The government introduced samples of these circulars, some of which contained warnings concerning the registration requirement. In these circumstances, the district court could fairly have inferred that petitioner was aware of the need to register.

Whenever a person engages in an activity or business that by its nature suggests the possibility of governmental regulation, moreover, *Lambert* is inapplicable. See *United States* v. *Freed*, 401 U.S. 601, 607-610. Petitioner's extensive experience in a strictly regulated industry should have alerted him to the possibility of the existence of special governmental regulations applicable to that activity. This Court did not intend to excuse ignorance in such situations.[7] See *United States* v. *Various Gambling Devices*, 478 F.2d 1194, 1197-1198 (C.A. 5); *United States* v. *Weiler*, 458 F.2d 474, 477-480 (C.A. 3); *United States* v. *Betancourt*, 427 F.2d 851, 855 (C.A. 5).

2. Neither does the registration requirement violate petitioner Putch's privilege against compelled self-incrimination. Under 15 U.S.C. 1173(a)(4), petitioner Putch was only required to set forth in his registration (1) his name and trade name, (2) his business address, (3) the location of his business records, and (4) the activities enumerated in 15 U.S.C. 1173(a)(3) in which he intended to engage. Since neither the activities described in Section

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[7] *United States* v. *Mancuso*, 420 F.2d 556 (C.A. 2), does not support petitioner's contrary contention. At issue in that case was a *criminal* conviction for violation of a statute requiring registration, prior to international travel, by any person who used narcotics or had ever been convicted of a narcotic-related offense for which the possible penalty was imprisonment for more than one year. The trigger for the registration requirement in *Mancuso* was materially different, therefore, from that in the present case. While the appellant in *Mancuso* might have been able to argue with some force that he should not have been held accountable for failing to register before leaving or entering the United States—a requirement to which he was subject because of a 17-year-old conviction for violating the narcotic laws—that argument loses all force in circumstances such as are present here. As noted above, petitioner had been engaged for almost twenty years in a strictly regulated industry commonly known to be subject to registration requirements.

1173(a)(3) nor the ownership of pinball machines was illegal at the time registration was required,[8] petitioner's disclosure of such information would not have subjected him to any danger of criminal prosecution. His activity was not in an area "permeated with criminal statutes," nor was he "inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. His reliance upon *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and related cases is therefore misplaced. In those cases, registration was tantamount to admission of criminal activity; here, no such admission is entailed. In these circumstances, there was no violation of petitioner's privilege against self-incrimination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[8]Petitioner admits that possession of pinball machines was legal at the time of the seizure (Pet. 13). In 1970, when the seizure involved in this case took place, Putch was indisputably engaged in a legitimate business in Louisiana. As an owner and possessor of pinball machines, Putch would have been vulnerable to state prosecution only if the machines were actually used in gambling activities rather than for their amusement value—and he has made no such claim of illegal use here. See *United States* v. *5 Gambling Devices*, 346 F. Supp. 999, 1002 (W.D. La.). In any event, none of the information called for on the registration form would have disclosed whether petitioner, or others, were using the pinball machines for gambling purposes rather than for their amusement value. When La. R.S. 15:31 was amended, effective January 1, 1973, mere possession of these machines became illegal regardless of their use. This amendment was adopted long after petitioner Putch's obligation to register had matured and after the seizure of the machines here had taked place.